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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MARY BARRETT,

Plaintiff,

vs.

MARION COUNTY, PAT DONENFELD,
and RICK SHERMAN,

Defendants.

Civ. No. 07-6337-TC

OPINION AND ORDER

Coffin, Magistrate Judge:

Defendants move to dismiss and strike portions of plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f) (#12), and to strike plaintiff's declaration (#30). For the reasons that follow, defendants' motion to dismiss is granted in part and denied in part, and the motion to strike is denied.

Background

Plaintiff, a former employee of defendant Marion County,

1 filed a complaint alleging violations of state and federal law,
2 including Title VII, the Age Discrimination in Employment Act,
3 the Americans with Disabilities Act, intentional infliction of
4 emotional distress, and due process. Defendants seek to dismiss
5 untimely and unsupported claims or, in the alternative, to strike
6 those claims from the complaint.

7
8 Standard

9 Dismissal for failure to state a claim under Fed. R. Civ. P.
10 12(b)(6) is appropriate where it appears beyond doubt that the
11 plaintiff can prove no set of facts to support the claim that
12 would entitle her to relief. Keniston v. Roberts, 717 F.2d 1295,
13 1300 (9th Cir. 1983) (citing Conley v. Gibson, 355 U.S. 41, 45-46
14 (1957)). Moreover, "[m]aterial allegations in a complaint must
15 be taken as true and viewed in the light most favorable to the
16 plaintiff." Geraci v. Homestreet Bank, 347 F.3d 749, 751 (9th
17 Cir. 2003) (citing Davison v. Columbia/HCA Healthcare Org., 241
18 F.3d 1131, 1133 n. 1 (9th Cir. 2001).

19 Fed. R. Civ. P. 12(f) allows a court to order stricken from
20 any pleading "any redundant, immaterial, impertinent, or
21 scandalous matter." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d
22 880, 885 (9th Cir. 1983). "[T]he function of a 12(f) motion to
23 strike is to avoid the expenditure of time and money that must
24 arise from litigating spurious issues by dispensing with those
25 issues prior to trial[.]" Id. at 885.

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Discussion

I. ADA, ADEA, and Title VII Claims

Plaintiff makes federal claims for disability discrimination under the American with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"), and hostile work environment and retaliation due to age and sex under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII). Defendants contend that plaintiff failed to exhaust her administrative remedies and that those claims must therefore be dismissed.

To bring a claim in federal court under Title VII, the ADA, or the ADEA, a plaintiff must first exhaust administrative remedies by filing a timely charge with the Equal Employment Opportunity Commission ("EEOC") or the state agency to whom investigative authority has been delegated. 42 U.S.C. § 2000-e-5(e)-(f) (Title VII); 42 U.S.C. § 12117(a) (ADA); 29 U.S.C. § 626(d) (ADEA). "[T]he administrative charge requirement serves the important purposes of giving the charged party notice of the claim and narrowing the issues for prompt adjudication and decision." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002).

When a plaintiff seeks judicial relief for claims not listed in the original charge, the complaint "nevertheless may encompass any discrimination like or reasonably related to the allegations of the . . . charge." Oubichon v. North Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973). Subject matter extends over allegations that fell within the scope of the agency's actual investigation or an investigation which can reasonably be

1 expected to grow out of the allegation of discrimination.
2 B.K.B., 276 F.3d at 1100; see also Sosa v. Hiraoka, 920 F.2d
3 1451, 1456 (9th Cir. 1990) (the court "must inquire whether the
4 original EEOC investigation would have encompassed the additional
5 charges made in the court complaint but not included in the EEOC
6 charge itself").

7 A plaintiff's claims are reasonably related to allegations
8 in the charge "to the extent that those claims are consistent
9 with the plaintiff's original theory of the case." B.K.B., 276
10 F.3d at 1100. While also considering the principles of notice
11 and fair play, the court construes the language of the charges
12 "with utmost liberality since they are made by those unschooled
13 in the technicalities of formal pleading." Id. (internal
14 quotations omitted). "It is appropriate to consider such factors
15 as the alleged basis of the discrimination, dates of
16 discriminatory acts specified within the charge, perpetrators of
17 discrimination named in the charge, and any locations at which
18 discrimination is alleged to have occurred." Id.

19 The "crucial element of a charge of discrimination is the
20 factual statement contained therein." Id. The question of
21 whether a claim has been sufficiently exhausted "must focus on
22 the factual allegations made in the charge itself, describing the
23 discriminatory conduct about which a plaintiff is grieving."
24 Freeman v. Oakland Unified Sch. Dist., 291 F.3d 632, 637 (9th
25 Cir. 2002). That inquiry will reveal the actual focus of the
26 administrative charge and the scope of the claims exhausted. Id.

27 A. ADA

28 On her March 2007 BOLI Employment Discrimination

1 Questionnaire, plaintiff checked both the "sex" and "age" boxes,
2 but not disability. She also left the disability complaints page
3 blank. However, she mentioned a "back injury" on the injured
4 worker complaint page. In addition, she had submitted a letter
5 shortly before the charge was drafted detailing not only
6 instances of perceived sex discrimination, but also a paragraph
7 indicating that plaintiff asked her supervisor if she could
8 carry less weight for over one year "as my back was hurting
9 more." She stated that a male colleague was allowed to carry
10 less weight and to write reports by hand. She detailed her
11 workers' compensation claim and eventual accommodation. She also
12 stated that she "filed with the ADA committee for the county and
13 am unable to meet the requirements. I have responded to the ADA
14 committee and declined the option that was given to me."

15 In response to BOLI's request for more detailed information,
16 plaintiff asserts that she misplaced her response letter and
17 mailed it when she found it, which was more than the required 15
18 days later. Those responses detail possible age, sex, and
19 disability discrimination. In a section discussing her
20 experience with the ADA Committee, plaintiff said that she was
21 asked to choose between four accommodations; she declined the
22 accommodation that was offered. Plaintiff explained her belief
23 that her supervisor knew of her requested accommodation and was
24 "singling [her] out with a different time than my coworkers."
25 She asserts that she was required to turn in her reports at the
26 end of the day, while coworkers had until the next morning. She
27 noted feeling "a sense of retaliation for filing the workers
28 comp. claim and HR complaints," and stated that it was "because

1 of my supervisor not working with me to find an alternative to
2 packing a computer on my back that I filed a workers comp. claim
3 and ADA claim. I do not feel he will be willing to extend my
4 time inputting time."

5 The official BOLI complaint stated that plaintiff alleged
6 "disparate treatment because of my sex and/or age." The
7 complaint included a brief mention of plaintiff's difficulty
8 carrying weight on her back, stating that the computer "is heavy
9 and it is difficult for me to carry the computer because it makes
10 my back ache. A male coworker had been allowed to write his
11 reports with pen and paper instead of carrying the computer from
12 2004 through March 2007. I asked that I be allowed to write
13 field reports with pen and paper in lieu of carrying the
14 computer. My request was denied." Defendants contend that the
15 BOLI charge does not contain allegations of disability
16 discrimination or any reference to an alleged physical disability
17 and argue that plaintiff voluntarily limited the scope of the
18 investigation even after being "warned of the consequences."

19 Plaintiff's disability discrimination claim is reasonably
20 related to her general allegations of discrimination or can
21 reasonably be expected to grow out of those allegations. Even if
22 they are considered "additional" claims, they are consistent with
23 plaintiff's overall theory-that she was discriminated against
24 based upon her sex, age, disability, or some combination thereof.
25 Because we are to construe the charge liberally, we deny
26 defendants' motion to dismiss the disability claim.

27 B. ADEA and Title VII

28 The BOLI charge included disparate treatment allegations

1 based upon plaintiff's age and gender, but it did not include
2 allegations of hostile work environment or retaliation based upon
3 those characteristics, as plaintiff's complaint now does.
4 Defendants contend that, even if this court considers the
5 untimely additional materials, those materials simply mention one
6 allegation of retaliation based on age or gender. Defendant
7 argues that plaintiff did not provide facts in any of her
8 materials that support a hostile work environment or retaliation
9 theory based upon age or sex.

10 In order to make a hostile environment sex discrimination
11 claim, plaintiff must show that she was subjected to verbal or
12 physical conduct of a sexual nature, that the conduct was
13 unwelcome, and that the conduct was "sufficiently severe or
14 pervasive to alter the conditions of her employment and create an
15 abusive work environment." Vasquez v. County of Los Angeles, 349
16 F.3d 634, 642 (9th Cir. 2003). A hostile environment may result
17 from a single instance of sexual harassment if the harassing
18 conduct is sufficiently severe. Brooks v. City of San Mateo, 229
19 F.3d 917, 925-27 (9th Cir. 2000).

20 At the motion to dismiss stage, plaintiff need not support
21 her allegations with evidence, but her complaint must allege
22 sufficient facts to state the elements of a hostile work
23 environment claim. See Williams v. Boeing Co., 517 F.3d 1120,
24 1130 (9th Cir. 2008) ("Even though heightened pleading is not
25 required in discrimination cases, the complaint must still 'give
26 the defendant fair notice of what the plaintiff's claim is and
27 the grounds upon which it rests.'" (quoting Swierkiewicz v.
28 Sorema N.A., 534 U.S. 506, 512, 2002)). The ADEA hostile

1 environment standard is identical. Sischo-Nownejad v. Merced
2 Cnty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991).

3 Even when her supplemental materials are considered,
4 plaintiff fails to make a claim as a matter of law for hostile
5 work environment based on age or sex. Plaintiff alleges that her
6 supervisor made three comments ("I send Devon to the CD's nurses
7 on outbreaks because he is 'candy to their eyes,'" "I would never
8 have women second in water," and "I would never let a woman drive
9 my truck") that, even when taken together, do not meet the severe
10 and pervasive standard. Furthermore, although plaintiff's
11 written materials contain her suspicion that she was passed over
12 because of her age, there is no allegation of hostile work
13 environment based upon age. The claims for hostile environment
14 based upon age and sex are dismissed.

15 In contrast, plaintiff's retaliation claims based upon age
16 and gender survive because the supplemental written materials
17 contain numerous allegations of retaliation. The BOLI claim does
18 not mention retaliation; however, the retaliation allegations are
19 reasonably related to the general allegations of discrimination
20 or can reasonably be expected to grow out of those allegations.
21 Even if they are considered "additional" claims, they are
22 consistent with plaintiff's overall theory-that she was
23 discriminated against based upon her sex, age, disability, or
24 some combination thereof, and that her former employer retaliated
25 against her when she reported it. Because we are to construe the
26 charge liberally, we deny the motion to dismiss those portions of
27 plaintiff's claims based on a retaliation theory.

28 II. Claims related to plaintiff's subsequent termination

1 The parties agree that plaintiff has not filed a BOLI charge
2 relating to her subsequent termination and that those claims
3 should be dismissed. Those claims that relate to retaliation
4 based on termination under Title VII and the ADA are therefore
5 dismissed without prejudice.

6 III. Age and gender disparate treatment claims

7 Defendants argue that plaintiff's disparate treatment claims
8 based on age and gender are barred by the applicable statutes of
9 limitations. Plaintiff's federal disparate treatment claims may
10 not be based on acts predating July 12, 2006, or 300 days prior
11 to filing a charge with the EEOC on May 8, 2007. 42 U.S.C. §
12 2000e-5(1) (Title VII); 29 U.S.C. § 626(d)(2) (ADEA).
13 Defendants' motion to dismiss claims of disparate treatment that
14 occurred prior to July 12, 2006, is granted.

15 Plaintiff points out that an employee may use prior acts as
16 background evidence in support of a timely claim. See Nat'l R.R.
17 Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). However,
18 plaintiff's specific assertion, that the evidence can be used to
19 support her hostile environment and due process claims, is
20 misplaced because those claims are now dismissed.

21 IV. State law claims

22 Plaintiff makes several claims based on state law, including
23 state statutory discrimination, intentional infliction of
24 emotional distress, and whistle blowing. Defendants contend that
25 several of those claims are barred under the Oregon Tort Claims
26 Act ("OTCA"). The OTCA requires that a plaintiff submit notice
27 to a public body of an injury or loss allegedly caused by the
28 public body or its officials, employees, or agents in breach of

1 a legal duty within 180 days of the date that the injury or loss
2 occurred. ORS 30.275(2). If timely notice is not provided, no
3 civil tort action may be maintained. ORS 30.295(1).

4 Plaintiff alleges that she filed a "second" tort claims
5 notice on or about March 29, 2007. The complaint does not
6 reference a "first" or previous notice. Because there is no
7 evidence in the record of an earlier notice, we assume that
8 occurrences of discrete acts of discrimination occurring before
9 September 30, 2006 are not actionable under the OTCA.

10 Plaintiff makes a "continuing tort" argument, contending
11 that she may seek recovery for the cumulative effect of wrongful
12 behavior, including acts that occurred before that date, citing
13 Griffin v. Tri-County Metro. Transp., 831 P.2d 42 (Or. App. 1992)
14 , rev'd in part on other grounds, 870 P.2d 808 (Or. 1994) as
15 support. It is true that "Oregon cases have used a continuing
16 tort analysis to allow claims that would otherwise be time-
17 barred." Id. at 46. "[A]t the heart of the continuing tort idea
18 is the concept that recovery is for the cumulative effect of
19 wrongful behavior, not for discrete elements of that conduct."
20 Davis v. Bostick, 580 P.2d 544, 544 (Or. 1978). In Davis, the
21 defendant's treatment of the plaintiff was continuous, but each
22 act was discrete and thus separately actionable, not merely an
23 element of a single tort. In Griffin, however, the separate
24 incidents were not discrete, but made up a "systematic pattern of
25 conduct, aimed at causing [the] plaintiff's eventual
26 termination." 831 P.2d at 46.

27 The court in Atwood v. Or. Dep't of Transp., No. CV-06-1726-
28 ST, 2008 WL 803020, at *2 (D. Or. March 20, 2008), clarified that
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1 the "related acts" method of establishing a continuing violation
2 has been invalidated; instead, discrete discriminatory acts that
3 occurred outside the statute of limitations are separately
4 actionable and time-barred, but can be used as background
5 evidence in support of a timely claim.¹ The court made clear that
6 the same policy rationale applies to state statutory
7 discrimination claims. Id. at *11. Specifically, "a hostile
8 work environment claim seems to be exactly the kind of claim
9 which 'recovery is for the cumulative effect of wrongful
10 behavior'" (citing Bostick, 580 P.2d at 547). However, refusal
11 to grant accommodations and retaliation events are discrete,
12 separately actionable claims and are thus subject to the OTCA.
13 Id.

14 Therefore, unless a theory of continuing violation applies,
15 plaintiff's claims pertaining to events occurring before
16 September 30, 2006, are time-barred, and defendant's motion to
17 dismiss those claims is granted. To the extent that plaintiff
18 claims that incidents as a whole were a systematic pattern of
19 conduct that led to a specific injury, e.g., IIED or state
20 hostile work environment claims, then incidents occurring outside
21 the 180-day period are not time-barred.²

22 V. FMLA and OFLA claims

23 The parties agree that the plaintiff failed to allege facts
24 sufficient to support those claims, and they are dismissed for
25

26 ¹ The court was applying the rule to § 1983 and Title VII claims,
27 both of which plaintiff makes here.

28 ² Defendants do not challenge plaintiff's state law hostile work
environment claims.

1 failure to state a claim.

2 VII. Due process claim

3 Plaintiff alleges that the individual defendants Donenfeld
4 and Sherman violated her "due process rights protected by the
5 Fourteenth Amendment" and that she was deprived of "property and
6 liberty" as a result. A procedural due process claim requires
7 the plaintiff to possess some liberty or property interest that
8 would trigger federal due process protection. Bd. of Regents v.
9 Roth, 408 U.S. 564, 569 (1972); Stretten v. Wadsworth Veterans
10 Hosp., 537 F.2d 361, 365 (9th Cir. 1976). It is only when such
11 an interest exists that the court determines what sort of process
12 is constitutionally required. Stretten, 537 F.2d at 365.

13 Plaintiff does not allege facts sufficient to establish that
14 she possessed a protected liberty interest. The complaint lacks
15 allegations relating to termination, the reasons for termination,
16 or whether those reasons were publicized. Cf. Roth, 408 U.S. at
17 573 (employee entitled to notice and a hearing when fired for
18 reasons that may seriously damage standing in the community).
19 Reasons for dismissal that implicate a protected liberty interest
20 include accusations of moral turpitude, such as dishonestly or
21 immorality, that are shared with the public. Id.; Campanelli v.
22 Bockrath, 100 F.3d 1476, 1480 (9th Cir. 1996) (stating that
23 liberty interest is implicated when former employer publishes
24 accusations of former coach verbally abusing his players to the
25 point of inflicting physical and mental illness upon them).

26 Plaintiff does not allege facts sufficient to establish that
27 she possessed a liberty interest for which appropriate process
28 was due. The complaint lacks allegations regarding plaintiff's

1 subsequent termination. In fact, plaintiff has admitted that any
2 allegations involving termination are premature.

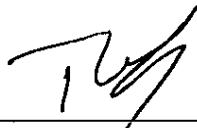
3 As for plaintiff's due process claim based upon an alleged
4 property interest, plaintiff has not established an entitlement
5 to a government benefit. Plaintiff does not allege an interest
6 regarding the loss of her job; therefore, continued employment
7 cannot form the basis of any property interest claim. Plaintiff
8 was still employed at the time she filed the complaint.

9 Plaintiff's complaint fails to allege facts sufficient to
10 amount to a compensable due process claim. Those claims are
11 dismissed.
12

13 Conclusion

14 For the foregoing reasons, defendants' motion to dismiss
15 and strike portions of plaintiff's complaint (#12) is granted
16 in part and denied in part, and defendants' motion to strike
17 plaintiff's declaration (#30) is denied.
18

19 Dated this 15th day of September, 2008.
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23 THOMAS M. COFFIN

24 United States Magistrate Judge
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